COURT OF APPEALS, DIVISION THREE, STATE OF WASHINGTON

In re the Marriage of:	)	**No. 26987-6-III**
	)	
LOU ANN WIBBELMAN,	)	
	)	**ORDER AMENDING**
Appellant,	)	**OPINION**
	)	
and	)	
	)	
LAUREN E. WIBBELMAN,	)	
	)	
Respondent.	)	

IT IS ORDERED, that the opinion filed June 23, 2009 is amended as follows:

Page 5, new second paragraph is inserted as follows:

RCW 26.09.080 requires the court to consider multiple factors in reaching an equitable conclusion. *In re Marriage of Rockwell*, 141 Wn. App. 235, 242-243, 170 P.3d 572 (2007), *review denied*, 163 Wn.2d 1055 (2008). The trial court has broad discretion in distributing the marital property and its decision will be reviewed only when discretion was exercised on untenable grounds or for untenable reasons. *In re Marriage of Muhammad*, 153 Wn.2d 795, 803, 108 P.3d 779 (2005).

Page 7, Paragraph 3 is changed as follows: Sentences 4 and 5 are hereby deleted:

The following shall be inserted after sentence 3:

As required by chapter 26.09 RCW, the trial court here clearly considered the parties' financial resources, employment skills, physical and mental conditions, education levels and expected future earning capacities in rendering its memorandum decision. When the trial court has weighed the evidence, our role is simply to determine whether substantial evidence supports the findings and in turn whether the findings support the conclusions of law. *In re Marriage of Greene*, 97 Wn. App. 708, 714, 986 P.2d 144 (1999). We do not substitute our judgment, weigh the evidence or adjudge witness credibility. *In re Marriage of Rich*, 80 Wn. App. 252, 259, 907 P.2d 1234, *review denied*, 129 Wn.2d 1030, 1031 (1996). We conclude the trial court's decision was rational and based on tenable grounds.

The remainder of the opinion shall be unchanged.

DATED:

BY A MAJORITY:

_____
JOHN A. SCHULTHEIS
CHIEF JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Marriage of:	)	**No. 26987-6-III**
	)	
LOU ANN WIBBELMAN,	)	
	)	
Appellant,	)	
	)	**Division Three**
and	)	
	)	
LAUREN E. WIBBELMAN,	)	
	)	
Respondent.	)	**UNPUBLISHED OPINION**

Korsmo, J. — Ms. Lou Ann Wibbelman appeals the trial court's decision to award her 54 percent of the community property upon dissolution of her marriage to Lauren Wibbelman. Both of the Wibbelmans seek attorney fees in this action. We affirm the trial court's discretionary division of the property and deny the mutual requests for attorney fees.

FACTS

At the time of the dissolution of their 29-year marriage in 2008, Ms. Wibbelman was 51 and Mr. Wibbelman was 49. The marriage produced two adult daughters who were not dependent upon their parents. Accordingly, division of the property was the primary issue at trial.

The couple owned Northwest Construction Improvements (NCI), a business that built cell phone towers. The company did quite well over the years[1] and the parties enjoyed "a very comfortable lifestyle." Clerk's Papers (CP) 645. Ms. Wibbelman did on-and-off bookkeeping for the company, while Mr. Wibbelman was the driving force for the company and, at the time of dissolution, was the only employee. The cell tower construction market was mature, leaving less work than during the industry's growth phase. Ms. Wibbelman suffered from depression and had no valuable employment skills. Mr. Wibbelman suffered from significant back pain and would be less involved in physical work for the company than he had in the past.

The couple had parlayed their business success and sales of real property into a home near Cle Elum known as the Teanaway property. The NCI office and equipment were moved to the property. The couple also purchased an annuity from ING for

[1] The memorandum decision notes the annual income to the family over the preceding ten years. The average income was approximately $325,000. The majority of the income, however, was earned in the first five years. CP 645 (fn. 6).

$500,000 and additional real estate.

Ms. Wibbelman filed for dissolution of the marriage. Temporary orders were entered requiring Mr. Wibbelman to pay her $5,000 per month plus one-half of her healthcare and therapy expenses up to $600 per month. Mr. Wibbelman was given sole use of the Teanaway property and was designated the exclusive operator of NCI. The matter proceeded to trial at the end of the year.

Ms. Wibbelman sought monthly maintenance of $5,000 until she turned 62 and would be eligible for social security benefits. Mr. Wibbelman proposed two years of maintenance, with the first year at $2,000 per month and the second year at $1,000 per month.

The trial judge concluded that maintenance would not be awarded. Instead, an unequal property division would be entered with Ms. Wibbelman receiving a larger share.

The trial court valued the total estate at $3,026,612, all of which was community property. The Teanaway property was valued at $918,000 and NCI was valued at $300,000. The trial court awarded both of those assets, along with the other real property owned by the couple, to Mr. Wibbelman. The total value of the property awarded to him was $2,236,309. Ms. Wibbelman was awarded personal property worth $790,303, the majority of which was the ING annuity (valued at $624,000). To off-set the disparity,

Ms. Wibbelman was granted a lien worth $849,439 against the Teanaway property. Mr. Wibbelman was ordered to make interest only payments on the lien for twelve months, and Ms. Wibbelman was allowed to foreclose on the property at the end of that period.

The parties recognized that the effective distribution of the community assets was 54 percent to Ms. Wibbelman and 46 percent to Mr. Wibbelman. The decree of dissolution was entered February 26, 2008. Ms. Wibbelman moved to reconsider the distribution. The motion was denied March 11, 2008. Ms. Wibbelman then timely appealed to this court.

ANALYSIS

Property Distribution. Ms. Wibbelman contends the trial court erred in its property distribution award, essentially arguing that the excess property awarded her needed to be valued for maintenance purposes and the amount of the maintenance explained. We disagree and conclude that the trial court did not abuse its discretion in making the property award.

As Justice Brachtenbach observed several years ago:

> We once again repeat the rule that trial court decisions in a dissolution action will seldom be changed upon appeal. Such decisions are difficult at best. Appellate courts should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served by finality. The spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court. . . . The trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion.

In re Marriage of Landry, 103 Wn.2d 807, 809-810, 699 P.2d 214 (1985) (citations omitted).

RCW 26.09.080 requires the court to consider multiple factors in reaching an equitable conclusion. *In re Marriage of Rockwell*, 141 Wn. App. 235, 242-243, 170 P.3d 572 (2007), *review denied*, 163 Wn.2d 1055 (2008). The trial court has broad discretion in distributing the marital property and its decision will be reviewed only when discretion was exercised on untenable grounds or for untenable reasons. *In re Marriage of Muhammad*, 153 Wn.2d 795, 803, 108 P.3d 779 (2005).

The parties do not dispute this standard for review. Instead, Ms. Wibbelman appears to argue that a detailed calculation for the award in lieu of maintenance was required, citing to (among other cases) *In re Marriage of Sheffer,* 60 Wn. App. 51, 802 P.2d 817 (1990), and *In re Marriage of Estes,* 84 Wn. App. 586, 929 P.2d 500 (1997). She thus essentially argues that the trial court abused its discretion in the property award by not following what she perceives to be a mandatory procedure.

Sheffer involved a dissolution where the wife had worked little outside of the home because of her husband's objection and thus had little in the way of job skills at the time the marriage ended. 60 Wn. App. at 52, 56-57. The trial court awarded her maintenance for three years, but also gave the husband a lien against the home that came

due in three years. In effect, the wife's income would drop dramatically at the very time she needed to pay off her husband's interest in the home. *Id.* at 56. This meant that three years in the future, the wife's net income would be substantially less than the husband's. *Id.* at 57. The appellate court was unconvinced that the trial court had carefully considered the economic realities of the parties at that point in time and therefore reversed the maintenance award. *Id.* at 57-58.

In *Estes,* the trial court had awarded property to the wife valued at $209,855, which included a transfer payment from the husband, and awarded the husband $188,352. The court also determined that the wife needed maintenance of $1,000 per month, but that the maintenance would end upon husband paying her $73,631. 84 Wn. App. at 589. The court also determined that additional maintenance was not necessary in light of the excess property awarded to the wife. *Id.* at 589-590. The husband immediately made the required property award transfer payment, effectively leaving the wife with no monthly maintenance. *Id.* at 592.

This court declared that because the maintenance award was avoided by making a required transfer payment, "the purported maintenance award was illusory, and is not supported by the court's finding Ms. Estes was in need of maintenance." *Id.* The court went on to note that the disparity in the property award amounted to little more than

$1,000 a month for 16 months. *Id.* at 593. The court stated that there was no finding about how much maintenance the wife needed or for how long she needed it. *Id.* Noting that the awards were not necessarily an abuse of discretion, the court remanded the case for factual findings concerning whether the effective maintenance award was appropriate in light of the earning capacities of the parties. *Id.* at 594.

Estes involved an award of maintenance that turned out to be illusory, as well as a property discrepancy designed to offset additional required, but unspecified, maintenance. In light of the failure of the original maintenance award because of the immediate transfer payment, this court remanded for the trial court to again look at the maintenance needs of the wife.

Sheffer and *Estes* did not create a requirement that all property awards in lieu of maintenance be quantified and justified. Here, of course, there was no maintenance award, but simply an increased property award in lieu of maintenance. No case requires the trial court to equate its extra award of property to an actual maintenance amount. Ms. Wibbelman essentially argues for such a standard, contending that the specific facts of the property settlement must be carefully viewed in order to assure a just and equitable distribution of the property.

We do not believe that the trial court was required to spell out how the extra assets

equated to needed maintenance. We noted in Landry, appellate courts should not tinker with awards or try to determine which assets are best distributed to which party. That is the job of the trial court. As required by chapter 26.09 RCW, the trial court here clearly considered the parties' financial resources, employment skills, physical and mental conditions, education levels and expected future earning capacities in rendering its memorandum decision. When the trial court has weighed the evidence, our role is simply to determine whether substantial evidence supports the findings and in turn whether the findings support the conclusions of law. *In re Marriage of Greene*, 97 Wn. App. 708, 714, 986 P.2d 144 (1999). We do not substitute our judgment, weigh the evidence or adjudge witness credibility. *In re Marriage of Rich*, 80 Wn. App. 252, 259, 907 P.2d 1234, *review denied*, 129 Wn.2d 1030, 1031 (1996). We conclude the trial court's decision was rational and based on tenable grounds.

Ms. Wibbelman complains that she was left with little in the way of liquid assets and would have to pay significant penalties to invade the ING annuity, thus making it worth less than the trial court had valued it. However, the bulk of the assets of the marital estate were not liquid. Mr. Wibbelman was given real estate and a business, neither of which could be sold or mortgaged without paying costs that also reduced the value of those assets. He received some liquid assets, but also had the need to operate the

business, which would presumably require cash to function.

Most importantly, the trial court's equalization lien functioned to provide Ms. Wibbelman with liquid assets. First, Mr. Wibbelman was required to pay interest on the lien amount for twelve months. This effectively was a maintenance award for that year. Second, the ability of Ms. Wibbelman to foreclose on the property essentially required Mr. Wibbelman to buy out the lien at the end of the year, effectively turning the lien into a cash asset. Accordingly, while the marital community had little in the way of cash assets at the time of the dissolution, a year later Ms. Wibbelman would have nearly all of her property in the form of liquid assets, and she would receive a cash flow during that first year. There would be no apparent need to invade the annuity account during that time, and there would appear to be no need to do so before retirement given the cash she received for the lien.

The trial court's distribution of the assets to Ms. Wibbelman was rational and equitable. If anything, it left her in a better position than Mr. Wibbelman at the end of the year. We discern no abuse of discretion.

Fault. Ms. Wibbelman also argues that in emphasizing Mr. Wibbelman's contributions to NCI, the trial judge "faulted" Ms. Wibbelman and punished her in the property distribution. This argument is baseless.

In its written comments awarding the property, the trial court noted that both parties had worked at NCI, but that Mr. Wibbelman was the "driving force" behind the company's success. CP 645. The court never said that Ms. Wibbelman should have contributed more to the business or was somehow responsible for NCI not achieving more than it did. The court directly addressed the parties in oral remarks at the end of trial and tried to describe how it was going to go about the job of distributing the property. The judge expressly told the parties that both were hard workers and that in Washington it did not matter who had earned the property. CP 823. In addressing the animosity he saw between the couple, something that he stated that he could not understand, the judge also told them that "fault" was not something that he could consider in his award. Rather, his job was to treat people fairly and put them in a position where they could go forward. CP 825.

Far from faulting Ms. Wibbelman in some manner, this record reflects that the trial judge dispassionately and carefully considered the property and the people before him and crafted a distribution scheme that permitted the parties to go forward. The recognition that Mr. Wibbelman was the "driving force" behind NCI served to explain why the company was placed in his hands. It would be the best chance for that asset to continue to generate income in the future.

There is no evidence in this record that the trial court considered "fault" in its property distribution.

Attorney Fees. Both parties requested that the other pay for the attorney fees in this appeal. RAP 18.1. Both timely filed the required financial affidavits necessary to support the request. RAP 18.1(c). Each affidavit recognizes that the lien was eventually paid off, and each continues to argue that the property distribution was unfair.

We have considered the requests and exercise our discretion to deny fees on appeal. In one manner or another, each party was left with substantial assets when their marital estate was dissolved. Each can pay for his or her own attorney fees in this action. However, Mr. Wibbelman is the prevailing party in this appeal and is entitled to his costs. RAP 14.1; RAP 14.2.

We affirm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

_____
Korsmo, J.

WE CONCUR:

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Schultheis, C.J.

_____
Sweeney, J.